United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-8395

UNITED STATES COURT OF APPEALS

For the Second Circuit.

75-7067

HUDSON TIRE MART, INC.,
Plaintiff-Appellant

B

against

AETNA CASUALTY AND SURETY COMPANY,

P/S

Defendant-Appellee.

On Appeal from the United States District Court --
Northern District of New York.

REPLY BRIEF FOR PLAINTIFF-APPELLANT.

Jerome D. Brownstein,
Attorney for Plaintiff-Appellant,
53 Third Street,
P.O. Box 839
Troy, N.Y. 12181
(518) 273-7073

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POINT I

JACKSON V. METROPOLITAN EDISON COMPANY DISTINGUISHED

The most recent pronouncement by the United States Supreme Court on what constitutes state action appeared in Jackson v. Metropolitan Edison Company, 43 LW 4110 (December 23, 1974). Petitioner Jackson claimed that she was deprived of due process of law when the Metropolitan Edison Company, a privately owned and operated Pennsylvania corporation, terminated her electric service before she had been afforded notice and an opportunity to be heard. Jackson sought damages and injunctive relief pursuant to 42 USC §1983.

The Supreme Court denied the petition on the grounds that no state action was present for purposes of the Fourteenth Amendment. The Court rejected the petitioner's theory that "state action" was present because of the monopoly status conferred upon Metropolitan Edison by the State of Pennsylvania, although the Court conceded that "[i]t may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics." 43 LW at 4112.

The Court established the following test for state action:

> The inquiry must be whether there is a sufficiently

> close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 43 LW at 4112.

It is respectfully submitted that this test of "state action" can be met in the situation at bar. Not only is Aetna Casualty and Surety Company a heavily regulated entity (see appellant's Brief on Appeal at pages 6-8), but the additional requirement of a "sufficiently close nexus between the State and the challenged action of the regulated entity" is also met. That nexus is established by the imposition upon the insured by the state of a standard form fire insurance policy which contains the "Cooperation Clause". By requiring the insured to enter into a contract containing the "Cooperation Clause", the state's presence is felt as strongly as if the state was itself a party to the contract with the insured. While the insurance company, by requesting an examination under the insurance policy, may be the entity that is pulling the trigger, the state, by mandating the terms of the insurance policy, is the entity that not only made the bullets but is now pointing the gun at the insured's head.

POINT II

THE DEPRIVATION OF THE INSURED'S DUE PROCESS RIGHTS CANNOT BE CURED BY A SUBSEQUENT HEARING ON THE MATERIALITY OF ANY QUESTIONS THE INSURED FAILED

TO ANSWER.

The defendant in its Brief on Appeal makes the point that "in the event a motion were ever made to dismiss the litigation instituted by the appellant on the ground of its failure to answer a material inquiry, appellant would have a full and complete opportunity to argue and present its position to the Court regarding the materiality of the inquiry in issue." (page 26 of defendant's Brief) The defendant's position being that this subsequent hearing would cure any due process defects inherent in the examination under the policy as precribed by the "Cooperation Clause".

It is respectfully submitted that defendant's position is untenable in light of the "meaningful time and meaningful manner" requirement of due process. The line of Supreme Court cases citing the "meaningful time and meaningful manner" requirement of due process includes Fuentes v. Shevin, 407 US 67, 32 L ed 2d 556, 92 Sup. Ct. 1983; Goldberg v. Kelly, 397 US 254, 25 L ed 2d 287, 90 Sup. Ct. 1011; Armstrong v. Manzo, 380 US 545, 14 L ed 2d 62, 85 Sup. Ct. 1187. See also, Arnett v. Kennedy, 416 US 134, ____, 40 L ed 2d 15, 47 (White, J., concurring). While Arnett v. Kennedy, supra, and Mitchell v. W. T. Grant Co., ____ U.S. ____, 40 L ed 2d 406 indicate that the meaningful time and manner requirement may vary depending on the surrounding circumstances, these cases do not abrogate that requirement.

The subsequent hearing on the motion to dismiss does not come at a meaningful time. As pointed out in plaintiff-appellant's Brief on Appeal (see page 19 of the Brief), if the examination of the insured was in the context of an examination before trial pursuant to New York Civil Practice Law and Rules or the Federal Rules of Civil Procedure, the plaintiff would have an opportunity to apply for a protective order, and would be able to get a determination as to exactly what it must disclose and what it need not disclose before sanctions could be taken against it for failure to comply with the discovery proceedings. Once the insured is deprived of the opportunity to apply for a protective order, it alone must decide whether or not to answer specific questions presented to it at an examination and it alone must bear the risk of being deprived of its right to recover under its policy because of a wrong decision.

The opportunity to prove that the failure to answer questions at the examination under the policy was reasonable does not put the insured in a position comparable to that in which he would have been in had he been able to apply for a protective order. The validity of this statement is graphically illustrated by the courts' decisions in Gross v. U.S. Fire Ins. Co., 71 Misc. 2d 815, 337 N.Y.S. 2d 221 (Kings Co. 1972); and Restina v. Aetna Cas. & Sur. Co., 61 Misc. 2d 574, 306 N.Y.S. 2d 219 (Schen. Co. 1969). (Discussed at page 19 of appellant's Brief on Appeal)

The New York courts have uniformly held that under circumstances similar to that present in the Gross and Restina cases, a party can invoke his privilege against self-incrimination and refuse to answer questions put to him at an examination before trial. See, e.g., Matter of Siegel v. Crawford, 266 App. Div. 878 (2d dept. 1943) aff'd 292 NY 651; Annonymous v. Annonymous, 39 App. Div. 2d 536 (1st dept. 1972). Thus the outcome of the Gross and Restina cases would probably have been quite different had the insureds been able to apply for a protective order. The due process rights of the insureds in the case at bar, Hudson Tire Mart, Inc., can only be protected by enjoining the insurer from attempting to examine Hudson Tire Mart, Inc., pursuant to the insurance policy.

Respectfully submitted,

JEROME D. BROWNSTEIN, ESQ.
Attorney for the Plaintiff-Appellant
53 Third Street, P.O. Box 839
Troy, New York 12181
(518) 273-7073

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

HUDSON TIRE MART, INC.,

Plaintiff-Appellant,

-against-

AFFIDAVIT OF SERVICE

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

STATE OF NEW YORK)
)SS.:
COUNTY OF RENSSELAER)

GAIL GRUBE being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Clifton Park, New York. On February 10, 1975 deponent served two (2) copies of the within Reply Brief for Plaintiff-Appellant upon Bouck, Holloway & Kiernan, attorneys for defendant-appellee in this action at 107 Columbia Street, Albany, New York 12210 the address designated by said attorneys for that purpose by depositing two (2) true copies of same enclosed in a post-paid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Gail Grube
GAIL GRUBE

Sworn to before me this
10th day of February, 1975

Marilyn R. Labanowski
Notary Public

MARILYN R. LABANOWSKI
NOTARY PUBLIC
STATE OF NEW YORK
My Commission expires March 30, 1977